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IN THE

Supreme Court of the United States

October Term, 1977

No. 77-1583

AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS, *et al.*,

Petitioners,

v.

COLUMBIA BROADCASTING SYSTEM, INC.,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MOTION FOR LEAVE TO FILE A BRIEF *AMICUS CURIAE* AND BRIEF OF THE AUTHORS LEAGUE OF AMERICA, INC. AS *AMICUS CURIAE*

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MOTION FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE*

The Authors League of America respectfully petitions for leave to file the annexed brief *amicus curiae*. The Authors League is the national society of professional authors and dramatists. Many of its members compose musical works, nondramatic performances of which are licensed by ASCAP and BMI. The Court of Appeals

decision would destroy the effectiveness of the licensing organizations and deprive these composers of the opportunity to collect compensation for performances of their work. Consequently, The Authors League requests permission to file its brief *amicus curiae*. The attorneys for ASCAP and Columbia Broadcasting System have consented to the filing of the brief.

Respectfully submitted,

IRWIN KARP
Attorney for The Authors League of America, Inc. as *amicus curiae*

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BRIEF OF THE AUTHORS LEAGUE OF AMERICA, INC.

Interest of The Authors League

The Authors League is the national society of professional authors and dramatists. Its 7,500 members write books, plays and other literary and dramatic works. Many of them compose musical works for the stage, and non-

dramatic performances of these works are licensed by ASCAP (American Society of Composers, Authors and Publishers) or BMI (Broadcast Music, Inc.). The Court of Appeals' decision would destroy ASCAP's and BMI's effectiveness as licensing organizations and, given the realities of the marketplace for music, thus deprive these composers of the practical means—in many marketplaces—of collecting compensation for public performances of their works and of enforcing the most valuable right granted to them by the United States Copyright Act.

Summary of Argument

I. The Court of Appeals erroneously ruled that blanket licenses for public performances of musical compositions are illegal *per se* under the Sherman Act. Blanket licensing is not a price-fixing device that is prohibited, *per se*, by the Sherman Act. ASCAP's blanket licenses serve legitimate needs of both users and composers of music, unrelated to any price-fixing scheme; and do not restrain competition between composers (or publishers).

II. The Court of Appeals decision that ASCAP should provide a per-use standard license rebuts its conclusion that ASCAP's blanket licenses are illegal *per se*. There is no difference, in an antitrust sense, between these two forms of standard licenses.

III. CBS was not entitled to a judgment declaring that blanket licensing was illegal *per se*. It was not obliged to accept a blanket license and, as the District Court found from the evidence, it is able to obtain licenses in direct negotiation with copyright owners.

IV. The Court of Appeals' decision ignores the antitrust realities of the marketplace for music.

ARGUMENT

I. Blanket Licensing Does Not Violate The Sherman Act.

A. The Function and Necessity of Blanket Licensing.

Decades of experience in the United States and many other countries demonstrates that blanket licensing is, for both users and copyright owners, the practical method of licensing public performances of music by broadcasters, restaurants, nightclubs and other users. (We are referring to "small" performance right licenses. "Grand" performance rights, e.g. to make dramatic uses of musical works in stage productions, are licensed individually and not by ASCAP.)

A given user may present or disseminate hundreds or thousands of performances in a year, using the works of countless composers. The costs of negotiating and administering a separate license for each performance of a particular composition often would be enormous in proportion to the royalty involved. Blanket licensing provides an essential cost and administrative saving for both copyright owners and users.

Blanket licensing also permits copyright owners to protect themselves against infringement and noncompliance with licenses. No composer or publisher could afford to monitor the hundreds of millions of performances throughout the United States each year to detect infringements of his or her compositions, or nonpayment of royalties for authorized performances.

Moreover, individual licenses cannot give users assured access and automatic clearance with respect to a vast collection of copyrighted musical works. Both conditions are essential to most users; blanket licensing provides them.

B. An ASCAP Blanket License is Not a *Per Se* Price-fixing Device That Violates Section 1 of the Sherman Act.

The Court of Appeals agreed with the District Court that an ASCAP blanket license is not an illegal tie-in or block booking mechanism because CBS (or any other user) could have acquired performance rights from individual copyright owners in a "direct negotiation market without having to take a blanket license from ASCAP." 562 F.2d 134.

The Court of Appeals, however, ruled that a blanket license was, *per se,* illegal as a price-fixing device; and could not be saved (vis-a-vis the three networks) under a "market necessity" exception, because a "direct negotiating market" was available—neatly snaring ASCAP in a classic CATCH 22. 562 F.2d 138.

The Court of Appeals' opinion thus brands all ASCAP blanket licenses* with all users as *per se* violations of the antitrust laws leaving ASCAP only the possibility of salvaging some licenses—at huge legal expense—under a "market necessity" exception. Unless the decision is reversed, ASCAP's blanket television network licenses will be declared *per se* invalid, and other blanket licenses will no doubt be attacked as price-fixing agreements.

The Authors League believes that the Court of Appeals erred. The blanket license is not, for the reasons discussed below, a *per se* violation of the Sherman Act. Indeed, the relief prescribed by the Court of Appeals totally rebuts its conclusion of *per se* invalidity and its reasons for reaching that conclusion. We respectfully submit that a blanket license is not a price-fixing device which is prohibited, *per se,* by Section 1 of the Sherman Act; and that the record

* Our arguments apply equally to the judgment against BMI which also should be reversed.

makes clear that the blanket license has not been employed by ASCAP in a manner which violates the Sherman Act.

As the Solicitor General noted in his *K-91* brief*

> "There are situations in which competitors have been permitted to form joint selling agencies or other pooled activities subject to strict limitations under the antitrust laws to guarantee against abuse of the collective power thus created. (case cited)" (Quoted at 562 F.2d 137)

The Court of Appeals in *K-91,* and the Solicitor General, concluded that ASCAP's blanket licensing did not violate the Sherman Act.

ASCAP's blanket licensing is, of course, "subject to strict limitations." ASCAP must grant a license to every user who requests it. If the user and ASCAP cannot agree on a fee, the user can request the District Court to set one. ASCAP cannot prevent its members from granting individual licenses in their compositions and ASCAP may not grant licenses to perform specific compositions.

Beyond that, however, an ASCAP blanket license does not fall within the price-fixing prohibitions of the Sherman Act for the following reasons.

C. ASCAP's Blanket License Serves Legitimate Needs of Users Totally Unrelated to Any Price-fixing Scheme.

(i) The blanket license is not a device by which a group of competitors arranges to sell their respective products to users at the same price. ASCAP does not separately license the compositions of each "competitor" (writer and publisher) at the same fixed price and remit that amount to the copyright owner.

* *K-91, Inc.* v. *The Gershwin Publishing Corp.,* 372 F.2d 1 (9th Circuit, 1967), cert. denied 389 U.S. 1045 (1968).

(ii) What ASCAP does license is a vast collection of musical works. The fee paid by a user is compensation for the right to use that *collection* during the licensed term. In effect, ASCAP offers a gigantic anthology of music to those who wish to perform various of its contents during the licensed period. The price of the "anthology" is not the sum of the fees a buyer would pay if it licensed separately the many compositions it wished to use. As with a literary anthology, the price of ASCAP's "anthology" is cheaper for bulk users than the costs of those contributions licensed separately.* Moreover, the price paid for ASCAP's anthology provides other benefits.

(iii) Each broadcaster or other user that chooses to "purchase" (i.e., blanket-license) ASCAP's anthology acquires the benefits of immediate access and automatic clearance—benefits it could not obtain (or could only obtain at enormously greater administrative cost and burden) by separate licensing of each composition through direct negotiation.

(iv) Those who obtain blanket licenses from ASCAP do so because they need immediate access and automatic clearance with respect to a vast collection of copyrighted musical works. With a blanket license, a user need not take time to seek out, then negotiate with, the copyright owner of each composition. There are no doubts as to whether the owner of a composition in ASCAP's anthology will agree to license the performance. The user obtains the guaranteed right, during the license period, to select and

* One difference between a literary anthology and ASCAP's anthology is of particular significance here. Usually, every author whose poem or article is published in a literary anthology is paid a fee and/or percentage of the total royalty on the book—whether or not those who buy the anthology have any interest in or "use" (read) his work. On the other hand, the composers whose works are included in ASCAP's anthology are only paid if their works are actually used, and only for those uses.

perform any compositions in the vast repertoire—including works that may just have been published.

(v) The blanket license thus is a separate product with distinct and practical benefits to users who acquire it. It is offered, and acquired, because of the inherent benefits it provides—and not as a subterfuge to obtain for all competing members the same price for the use of their works.

D. A Blanket License Does Not Restrain Competition Between Composers (or Publishers).

(i) A blanket license does not, as the Court of Appeals suggested, compensate composers whose "wares" are not used. The blanket license fees collected by ASCAP from networks and other users are distributed to members under a formula keyed to the type and number of performances of their works. The more performances a member has, the greater the amount of income distributed to him/her by ASCAP. The fewer the performances, the lower the amount a member receives. If there are no performances, the member receives nothing.

(ii) Under blanket licensing there is vigorous competition among the members of ASCAP: the most significant and socially valuable form of competition in the musical, literary and dramatic marketplaces—competition based on the merits of the works vigorously contending with each other for public acceptance. Too, distribution based on performance also stimulates vigorous competition between copyright owners in the promotion of their works in the broadcast, recording and other media.

(iii) The Court of Appeals speculated that a given member's income from ASCAP might be larger than the royalties he would have received in a free market through direct negotiation. We respectfully disagree. Since each member's ASCAP income is determined by the number of

performances, the value of his or her works are measured by the marketplace. Composers whose works are more highly valued by the market test of performance would receive greater royalties under individually negotiated licenses than composers whose works are valued lower.

We should also note that the *net income* received by some composers through ASCAP is probably more than the net income they would receive under individual licenses for two reasons. First, because the administrative costs and burden of negotiating individual licenses constitute a far greater drain on the gross royalties received. Second, because the wider availability of their compositions under a blanket license increases the possibility that these will be performed. Under individual, directly negotiated licenses, it is likely that works of merit by less prestigious authors or less affluent publishers would not be employed as frequently by users, who would concentrate on the larger catalogs of a few major publishers to minimize the administrative costs of direct licensing. Blanket licensing does not give these composers and publishers a "free ride" since payment is based on the marketplace's evaluation of merit—performances. But blanket licensing does give all bulk users the opportunity to perform the compositions they think best suited for their purposes.

(iv) An ASCAP blanket license is not, therefore, a subterfuge by which individual composers agree not to "compete" with each other in the licensing of their compositions to broadcasters, restaurants, nightclubs, and thousands of other users. Blanket licensing serves the legitimate and lawful needs of individual composers, seeking to exploit the performance right granted to each of them by the United States Copyright Act. It provides for them the opportunity to make their works available to a large number of potential performing entities. It elimi-

nates the greater administrative costs and burdens of individual licensing. It provides the only effective means for detecting and preventing infringing performances in thousands of outlets throughout the United States. It also avoids the costs of separately verifying compliance with individual licenses.

Moreover, blanket licensing permits each member of ASCAP to make his works available in a form which serves the needs of prospective music users, many of which would not perform his/her works if they were offered only under individual licenses, directly negotiated.

II. The Remedy Prescribed by the Court of Appeals Rebuts Its Conclusion of *Per Se* Illegality.

The Court of Appeals concluded that ASCAP's blanket licensing was illegal *per se* because "it reduces price competition among members and provides a disinclination to compete." 526 F.2d 140. Yet the validity of that conclusion is rebutted by the very remedy the Court of Appeals prescribes.

The Court said its objection to the blanket license would be removed "if *ASCAP itself* is required to provide some form of per use licensing which will insure competition among the individual members with respect to those networks which wish to engage in per use licensing." 562 F.2d 140 (emphasis supplied)

But a per use license provided by "ASCAP itself" would not differ in any antitrust sense from the present blanket license. An ASCAP per use license would grant to users (as does the blanket license) automatic clearance for performances of any or all compositions in its repertoire. An ASCAP per use license (as does the blanket license) would set a standard license fee, negotiated by

ASCAP and the user (or a schedule of standard fees for various categories of performances); the fee for the use of a composition still would not be negotiated directly by the individual composer or publisher and the user.

The only change from the current blanket license would be that the standard fee would be set on a per use basis rather than, as now, on the aggregate value to the user of performance rights in the repertoire during the period of the license. Finally, under an ASCAP per use license (as under the present blanket and per-program licenses) all ASCAP members would receive the same compensation for a use of their work. Plainly, an ASCAP per use license would not create greater price competition among its members than do the current blanket or per-program licenses.

We respectfully submit that the reasonable and equitable alternative to the blanket license is the one that has been available for almost 30 years—i.e., for CBS or the companies that produce its programs to engage in direct negotiations for individual licenses with those copyright owners whose works CBS wishes to have performed on the stations of its network.

III. CBS Is Not Entitled to a Judgment Declaring Blanket Licensing Illegal *Per Se*.

For the reasons stated above, we believe blanket licensing is not illegal *per se*. On this record, we submit that CBS is not entitled to a judgment that blanket licensing is unlawful. CBS has chosen not to execute a blanket license and, the record establishes, the license cannot be forced upon it. (Nor has ASCAP sought to coerce users to accept a blanket license.)

Moreover, the existence of blanket licensing with other users does not compel CBS to use it. CBS and the pro-

ducers are free to directly negotiate licenses with individual copyright owners. Judge Lasker's thorough analysis, accepted by the Court of Appeals, establishes that such direct negotiation of licenses is feasible through existing mechanisms in the marketplace of music. (400 F. Supp. pp. 755 to 768).

There is no proof that individual ASCAP members would refuse to grant licenses to CBS if it requested them. On the contrary, it is obvious that individual members of ASCAP readily would grant direct licenses for the use of compositions if CBS or the producers requested such licenses. (400 F. Supp. pp. 755 to 771). It required no parade of evidence—although a parade was held—to establish that composers and publishers simply could not afford to refuse licenses to CBS, should the network eschew the blanket license. Through its oligopolistic power in the television marketplace, CBS is an indispensable customer for their music. They would have no choice but to grant licenses through individual negotiation—faced with what the Court of Appeals termed ". . . the counterforce of the strong bargaining position of CBS." (562 F.2d 140, n. 7)

IV. The Court of Appeals Decision Ignores the Antitrust Realities of the Marketplace for Music.

Meaningful competition in a given marketplace requires competing buyers as well as competing sellers, and some semblance of equal bargaining power between buyer and seller communities. These conditions do not exist in the television marketplace. Three oligopolies control the lion's share of the television marketplace in this country: CBS, ABC and NBC. Each network owns five television stations in major markets; five enormous monopolies granted to it by the Federal Communications Commission. (cf. *Red Lion Broadcasting Co., Inc. et al.* v. *F.C.C.;* 395 U.S. 367, 388-9

(1969)). These monopolies allow CBS to determine what music (and other material) will be broadcast over these publicly-owned channels of communication it thus controls. In addition, CBS has combined and acts in concert with 200 other monopolists—the 200 affiliated stations of the network which control television channels in other market areas. Consequently, CBS exercises absolute power to determine what music shall be performed in network programs on the more than 200 television stations in the United States; CBS unquestionably exercises enormous oligopolistic power in the television marketplace.

While extolling the virtues of "price competition" between individual composers, the Court of Appeals ignores the realities of the marketplace in which it expects these economic Lilliputians to compete with each other. It is unrealistic to assume that an individual composer possesses bargaining power sufficient to match "the strong counterforce of the bargaining position of CBS." If the composer does not negotiate to CBS's satisfaction, he faces the strong possibility that his composition will not be performed in that huge segment of the television marketplace CBS controls.

In the real marketplace of television, moreover, there will be far less price competition between individual composers dealing with CBS than the Court of Appeals seems to assume. To a large extent, the price will be determined by what CBS chooses to pay, rather than the fact that composer A offers a cheaper license than composer B. Nor will CBS reject the highly popular composition it needs because it can license a less successful work at a lower price. Moreover, a primary effect of an ASCAP per use license, mandated by the Court of Appeals, would be to impose a *de facto* ceiling on the price that an individual composer or publisher could obtain from CBS. The history of negotiations by composers and publishers with record companies under the ceiling imposed by the Copyright Act on royalties for recordings of music (17 U.S.C. Sec. 115; and Sec. 1(e) of the 1909 Act), is persuasive evidence that this result will occur.

CONCLUSION

It is respectfully submitted that the decision appealed from be reversed, and the order of the District Court dismissing the complaint be affirmed.

Respectfully submitted,

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